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MEMORANDUM

To: Legislative Water Management Policy Blue Ribbon Commission
From: William C. Henchy, Counsel to Massachusetts Water Works Association, Inc.
Re: Legality of DEP Policy No. WMA #: BRP/DWM/DW/P04-1
Date: September 22, 2006

INTRODUCTION

In response to the urging of the Massachusetts Water Works Association Inc. and others, notably the Massachusetts Municipal Association, the General Court enacted, as part of the budget for the Department of Environmental Protection, a Blue Ribbon Commission to study and report to the Legislature on the effectiveness of DEP Policy No. WMA #: BRP/DWM/DW/P04-1 (hereafter the "policy").

One of the strong arguments made by the proponents of the Legislation creating this Commission is that the policy is entirely unlawful. The Blue Ribbon Commission, at its first meeting, agreed to take up the question of the legality of the Policy as part of the Commission's charge, for if the Policy is unlawful, it cannot be effective and must be rescinded, either by the Agency, of by Legislative action.

This Memorandum responds, on behalf of the Massachusetts Water Works Association, Inc. to the Commission's request for a legal analysis of the lawfulness of the DEP Policy.

It is clear to this author that the policy is an unlawful establishment of standards for the issuance of Water Management Act Permits and plainly violates G.L. c. 21G sec. 3 and 7. Should the Commission be confused by conflicting legal analyses concerning this issue, I urge the Commission, or the Legislature, to request the Attorney General for the Commonwealth to render a formal opinion pursuant to G.L. c 12 sec. 9 with respect to the issues raised by this Memorandum.

Executive Summary

The Massachusetts Water Management Act establishes a comprehensive statutory scheme requiring the establishment of Water Management Act permit standards, *by regulation*, to attain the balance amongst competing demands on the Commonwealth's water resources.[1]

The Policy explicitly states that:

> *The following standards and conditions will be included as appropriate in all permitting decisions, including the issuance of new permits, permit amendments, 5 Year Reviews of existing permits, or other permit modifications.* (See the Department's Guidance on this Policy for more details on implementation.)

- Cap on per capita per day residential water use (no more than 65 gallons per capita for high and medium stress basins, no more than 80 gallons per capita for low stress and unassessed basins).
- Limits on unaccounted for water (no more than 10% for high and medium stress basins, no more than 15% for low stress and unassessed basins).
- Summer limits on withdrawals (limit varies based on prior use).
- Streamflow thresholds that trigger mandatory limits on nonessential outdoor water use, including but not limited to lawn and landscape irrigation.
- Standard and consistent reporting requirements.
- Streamflow monitoring. (emphasis added)

As a series of standards and conditions which DEP explicitly states will be included in all Water Management Act permitting decisions, the policy's substantive provisions plainly fall within the meaning of those standards which must be enacted by regulation in accordance with G.L. c. 21G sec. 3 and 7.

Nevertheless, the Department plainly did not adopt these permit standards by regulation, as required by law. They are therefore *ultra vires* (beyond the Department's authority) as permit standards, and are a legal nullity. The Policy is entirely ineffective because it is unlawful. Any permit conditions which are based upon the policy are unlawful, are in excess of DEP's authority, and likely to be set aside by Judicial review.[2]

In addition, the Policy suffers from several substantive infirmities which render it susceptible to challenge on the grounds that it is an arbitrary and capricious exercise of DEP's discretionary authority. These additional infirmities, however, are not as clear a violation of law as the fact that the policy constitutes a series of Water Management Act Permit standards adopted in violation of the Legislative requirement to adopt such standards

[1] G.L. c. 21G sec. 3 and 7.

[2] Administrative Law Judges arguably do not have the jurisdiction to vacate permit decisions based upon written DEP policy on that particular ground. The Commonwealth's Courts suffer from no such jurisdictional infirmity.

by regulation, and it is somewhat less clear to me that these matters render the Policy unlawful. They are, however, additional "grist for the mill" to any judicial challenge to the Policy, and could be additional grounds for a judicial determination that the policy is unlawful.[3]

1. DEP's Power to Promulgate Policy

In many circumstances, DEP would be fully within its discretion and authority to promulgate policy which would have the effect of clarifying or interpreting existing statutes or regulations. In fact, such written guidance from an Administrative Agency is ordinarily very helpful; agencies are given considerable discretion to interpret their governing statutes and their own regulations. A written policy from the agency advising how it will interpret its regulations is generally a very helpful exercise of administrative authority, and serves laudable purposes of advising permit applicants and the public of the agency's interpretations, helps to reduce uncertainty in permitting decisions, and may avoid or limit litigation.

In point of fact, DEP Commissioner Gollege (now Acting EOEA Secretary) has stated publicly that these purposes were his intent when promulgating the policy.

Commissioner Gollege also has made very clear that the policy was promulgated without any input from outside the DEP whatsoever. The Commissioner is on the public record as stating that the policy was promulgated without public notice, without any opportunity to comment, and without prior public participation because (1) his Department was very understaffed at the time and lacked the resources to provide public comment or rulemaking pursuant to G.L. c. 30A; (2) his Department was besieged by a criminal grand jury investigation that further drained the resources of an already understaffed agency; (3) litigation and criticism of DEP's Water Management Act decisions was mounting from all sides, and (4) he wanted to end the uncertainty over how DEP would apply the Water Management Act and end the litigation which in his view was diverting both DEP and municipal resources away from substantive implementation of important Water Management Act goals.

Commissioner Gollege is on record as stating that the decision to promulgate the policy without public notice or opportunity to comment was his decision, that he made it knowingly, and that he would have done it again under the same circumstances. His forthrightness on this issue is commendable, and provides the appropriate framework for analysis.

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[3] These matters include the explicit and arbitrary reliance on the December 13, 2001 Stressed Basin Report as the basis for the policy where the Stressed Basin Report itself explicitly states that "the delineations (in the report) are intended for highlighting areas needing further study and for defining mitigation for potential projects. **Delineations are not intended to be used in any other way**"(emphasis added); and the failure of the policy to consider (or indeed make any reference to) the factors that all permit standards are required by G.L. c. 21G sec. 7 to take into account. These sorts of omissions make the policy an arbitrary and capricious exercise of the agency's power, which is not the central thrust of this memorandum, which is to point out that the policy is first and foremost a violation of the Legislature's explicit requirement to adopt permit standards for Water Management Act permits by regulation, and not by policy guidance.

2. Limitations on the Administrative Power to Promulgate Policy

In addition to the appropriate and lawful purposes for an agency's decision to promulgate written policy interpreting a statute or regulation, there are strong tactical advantages to an agency when it does so. Courts (and indeed, often Administrative Law Judges) are bound by statute,[4] practice, and binding precedent to give deference to the expertise and technical knowledge of an agency when exercising judicial review of an agency's decisions. The ordinary standard is one of "reasonableness"—if the agency's interpretation of its regulation is a reasonable one, even if compelling contrary evidence is present, or if the Court would reach a different result itself, the agency's interpretation must be permitted to stand. This is the legal equivalent of the "reasonable minds may disagree" expression, and under the law, the agency's interpretation governs.

When an interpretation of a statute or regulation is made through the expression of a written policy which is reasoned and articulates the basis for the agency's interpretation, the principle of deference is even further strengthened. Thus, when an agency especially desires to make its position on an issue hold up to judicial review, it is strongly in the agency's interest to express its interpretation through a written policy determination. Interpretations of governing statutes in this manner also permit the agency to avoid the meddlesome and sometimes lengthy process of public comment and rulemaking under G.L. c. 30A, and permit the agency to completely control the outcome, as the document generated is purely the result of internal deliberations within the agency.

This is exactly what DEP has done with the Water Management Act Policy WMA #: BRP/DWM/DW/P04-1, and Commissioner Gollege has articulated that one of the reasons for its adoption, namely to limit litigation arising from Water Management Act permit decisions, was motivated by this tactical consideration.

These tactical advantages to the promulgation of policy are well known to the DEP, and have lead to a proliferation of what is known in legal circles as "regulation by policy". Experienced administrative lawyers, Courts, and the Legislature are well aware of this tactic by the agency, and have responded in various ways.

Courts, for example, have asserted their own right to oversee administrative interpretations by repeatedly stating that the "principle is **deference, not abdication**, and courts will not hesitate to overrule agency interpretations when those interpretations are arbitrary, unreasonable, or inconsistent with the plain terms of the regulation itself." *Finkelstein v. Board of Registration in Optometry*, 370 Mass. 476, 478 (1976); *Crawford v. Cambridge*, 25 Mass. App. Ct. 47, 49 (1987); *Morin v. Commissioner of Pub. Welfare*,16 Mass. App. Ct. 20 (1983); *Cliff House Nursing Home, Inc. v. Rate Setting Comm'n*, 16 Mass. App. Ct. 300, 306 (1983); *Board of Educ. v. School Comm. of Amesbury*, 16 Mass. App. Ct. 508, 513-514 (1983); *Amherst Nursing Home, Inc. v. Commonwealth*, 16 Mass. App. Ct. 638,

[4] See G.L. c. 30A sec. 14.

640-641 (1983). *Warcewicz v. Department of Environmental Protection*, 410 Mass. 548, 574 N.E.2d 364 (1991). (emphasis added).

The Legislature and municipal governments are well aware of the DEP's propensity to "regulate by policy". Any regulatory authority possessed by DEP is conferred upon it by the Legislature, which has the power to define explicitly how DEP's rulemaking power can be exercised.

In the case of the Water management Act, plainly because of the importance of the subject matter, that is exactly what the Legislature did. The Water Management Act and its legislative history make very clear that the Legislature in G.L. c. 21G took the power to make rules through policy guidance away from the DEP explicitly.

3. The Water Management Act Explicitly Requires Standards and Conditions for Permits to be Promulgated by Regulation, and Not by Policy Guidance

The Water Management Act is a very progressive piece of legislation for a State which has, relatively speaking, abundant water resources. It directs the Executive branch, acting through the Department of Environmental Protection, to act towards the Commonwealth's water resources in a manner which is protective of both natural resources and the human population and economy of the Commonwealth, all of which are utterly dependent upon our shared water resources.

Given the stakes involved for all parties interested in the Commonwealth's water resources, the Legislature repeatedly required in the Act a full open and public process, beginning with the appointment of a Water Resources Management Advisory Committee with broad representation of municipal, water industry, agricultural, planning, conservation, watershed, and consumer interests. This body is charged with providing advice and consultation to DEP and following such consultation, DEP is charged with adopting regulations to implement the act, according to its terms, "pursuant to chapter thirty A".

The Water Management Act repeatedly refers to the Legislature's explicit command to adopt permit standards by regulation pursuant to G.L. c. 30A. In pertinent part, the Water Management Act states:

G.L.c. 21G, § 3. Planning and management of water use and conservation;

….There is hereby established within the department a water resources management advisory committee to provide advice and consultation to the department concerning matters covered by this chapter. The committee shall review the development of standards, rules and regulations for water resources management and shall supply recommendations concerning methods by which existing water management practices and the laws regulating them may be supplemented and improved and their administration financed.

The committee shall consist of at least eleven members appointed by the governor, one of whom shall be representative of the Associated Industries of Massachusetts, one of whom shall be a representative of the Massachusetts Municipal Association, one of whom shall be a representative of a watershed association, one of whom shall be a representative of the water works industry, one of whom shall be a representative of an agricultural association, one of whom shall be a representative of a consumer organization, one of whom shall be a representative of an environmental organization, one of whom shall be a representative of a water well driller association, one of whom shall be a representative from a regional planning agency, and two of whom shall be representatives of the public knowledgeable in environmental and water management affairs. The members of the committee shall have no financial interest in any recommendation or studies of the committee.

Said members shall serve without compensation and shall be eligible for reappointment. In making initial appointments to said committee, the governor shall appoint two members for terms of one year, three members for terms of two years, three members for terms of three years, and three members for terms of four years. Upon the expiration of the term of any such member, his successor shall be appointed for a term of four years. Persons appointed to fill vacancies shall serve for the unexpired term of said vacancy.

Pursuant to chapter thirty A, the department, after consultation with the advisory committee and with the approval of the commission, shall adopt such regulations as it deems necessary to carry out the purposes of this chapter, establishing a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses. Within one year of the effective date of this chapter, the department shall adopt, and thereafter from time to time may amend, regulations establishing procedures and forms for filing notifications and registration statements; reasonable registration fees; a mechanism to control water in the commonwealth during water supply and water quality emergencies, and a program for the enforcement of the provisions of this chapter and the regulations adopted thereunder. **Within two years of the effective date of this chapter, the department shall adopt, and thereafter from time to time may amend, regulations establishing criteria, standards and procedures for issuing permits, requirements for the content and form of permit applications, reasonable permit application fees, and requirements for monitoring, inspection and reporting of water withdrawals and usage by permitted water users'**. The decision to approve or deny a permit shall take place after compliance, where applicable, with section sixty-one to sixty-two H, inclusive of chapter thirty, and sections eight B to eight D, inclusive of chapter twenty-one. All regulations adopted by the department pursuant to this chapter shall conform to, and implement, the principles, policies and guidelines established by the commission under this section.

G.L.c. 21G, § 4. Withdrawal volume threshold.

Section 4. The withdrawal volume threshold to be applied pursuant to sections five and seven shall be one hundred thousand gallons per day. The department may, **by regulation**, raise or lower the threshold volume established in this section upon a finding that such different threshold is necessary and adequate to protect the public health, safety and welfare. The department shall not require any approval, other than that provided for in section thirty-nine C of chapter forty, for withdrawals less than such threshold volume.

The department may, **by regulation,** establish, for any particular water source, a lower threshold volume than that generally applicable in the commonwealth upon findings that such water source is in need of special protection because of the nature or volume of demands made upon it, and that the reduced threshold is therefore necessary and adequate to protect the public health, safety and welfare.

The department shall, no later than January first, nineteen hundred and ninety-one, and no less than every five years thereafter, initiate rulemaking procedures **in accordance with chapter thirty A,** to review and reassess the necessity and adequacy of the volume threshold in effect.

For the purposes of determining whether a withdrawal is in excess of the threshold volume, any withdrawal of water for a nonconsumptive use, as defined **by regulation** adopted by the department, shall not be counted in the volume of water withdrawn; provided, however, that any person withdrawing or proposing to withdraw water for a nonconsumptive use shall file, in accordance with **regulations** adopted by the department, a notification stating the amount being or to be withdrawn and demonstrating that the use is or will be nonconsumptive.

G.L.c. 21G, § 5. Registration statements; filing.

…..The department **shall, by regulation**, specify a schedule of expiration dates applicable to each water source from which there are existing withdrawals for which registration statements can be filed. All initial registration statements filed for existing withdrawals from the water source shall authorize such withdrawals until the next applicable expiration date thus specified; provided, however, that no registration statement shall authorize the continuation of existing withdrawals for a term greater than ten years.

The department **shall, by regulation**, establish a procedure for recognizing, as an existing withdrawal, a volume of water in excess of the average volume of water withdrawn from a particular water

source during the period from January first, nineteen hundred and eighty-one to January first, nineteen hundred and eighty-six if such volume of water is within the normal variation of withdrawals made by the registrant provided that the department shall not use such procedures to recognize, as existing withdrawals, such volumes of water which together exceed the safe yield of the water source from which the withdrawals are being made. Nothing in this section shall be deemed to prohibit any person making an existing withdrawal from obtaining a permit pursuant to section eleven.

G.L.c. 21G, § 7. Issuance of permits; criteria and standards.

Section 7. The department **shall, by regulation**, specify, for each water source from which withdrawals are to be permitted, a date upon which **its regulations establishing criteria, standards and procedures for issuing permits** shall become effective. No person may, after the effective date thus specified, make a new withdrawal of more than the threshold volume of water from any water source, or construct any building or structure which may require that person to make such a new withdrawal of water unless such person **obtains a permit in accordance with regulations** adopted by the department.

In adopting regulations establishing criteria and standards for obtaining permits, the department shall assure, at a minimum, that the following factors are considered:

(1) The impact of the proposed withdrawal on other water sources which are hydrologically interconnected with the water source from which the withdrawal is to be made;

(2) The anticipated times of year when withdrawals will be made;

(3) The water available within the safe yield of the water source from which the withdrawal is to be made;

(4) Reasonable protection of water uses, land values, investments and enterprises that are dependent on previously allowable withdrawals;

(5) The use to be made of the water proposed to be withdrawn and other existing, presently permitted or projected uses of the water source from which the withdrawal is to be made;

(6) Any water resources management plan for any city or town in which the affected water source is located;

(7) Any state water resources management plan adopted by the commission;

(8) Reasonable conservation practices and measures, consistent with efficient utilization of the water;

(9) Reasonable protection of public drinking water supplies, water quality, wastewater treatment capacity, waste assimilation capacity, groundwater recharge areas, navigation, hydropower resources, water-based recreation, wetland habitat, fish and wildlife, agriculture, and flood plains; and

(10) Reasonable economic development and the creation of jobs in the commonwealth.

G.L.c. 21G, § 10. Recommendations.

Section 10. The department **shall, by regulation**, establish a procedure to be followed in obtaining recommendations from local officials or bodies, regional planning agencies, or others including any comments received by the water resources management official pursuant to section nine, for use by the department in making findings under section eleven; provided, however, that failure of any local official or body or regional planning agency to make timely recommendations in accordance with such procedures shall not bar the department from ruling on any application if it determines that it has an adequate basis for making the findings required by regulation.

G.L.c. 21G, § 11. Issuance of permits; conditions; findings.

….The department **shall, by regulation**, specify a schedule of expiration dates applicable to each water source from which withdrawals are to be permitted. All permits for withdrawals from that water source shall be valid until the next expiration date thus specified; provided that no permit issued under this section shall be valid for a term greater than twenty years. Each person to whom a permit has been issued pursuant to this section shall file an annual statement of withdrawal, in accordance with regulations adopted by the department.

The emphasis in each of the foregoing sections is mine, but made to point out the repeated use of the phrase, following the reference in Section 3 to the adoption of regulations pursuant to G.L. c. 30A, "the Department shall by regulation….". The Legislature was fully aware of DEP's use of policy guidance when it adopted the Water Management Act and it explicitly denied DEP the use of that tool as a means to set permit standards.

Notwithstanding that clear legislative command, DEP has done exactly what G.L. c. 21G sec. 3 does not authorize. It has established permit standards without (1) the advice or review of the water resources management advisory committee and (2) has bypassed the Legislative requirement to act to adopt such standards as regulations in accordance with G.L.

c. 30A.[5] This conduct renders the policy entirely unlawful as a set of permit standards purportedly enacted by DEP in a manner specifically not authorized by the Legislature.

4. The Legislative History of the Water Management Act Makes Clear the Legislature's Explicit Concern Over Regulations Adopted Under The Act

The Water Management Act's journey through the 1985 session of the Legislature began on April 22, 2985, when S2200 was favorably reported out of the Committee on Natural Resources and Agriculture and referred, along with several others[6], to the Senate Committee on Ways and Means. The Committee on Ways and Means, on July 17, 1985, favorably reported an amended version of the bill, which was substituted as S2447, ordered to a third reading, and passed engrossed.

When the House considered the proposed legislation, its attention was focused on the issue of regulations implementing the law. On July 25, 1985 S2447 was referred to the House Committee on Ways and Means. On November 7, 1985, the House Committee on Ways and Means recommended that S2447 ought to pass.

During debate on the bill by the House on November 12, 1985, an amendment was immediately offered that required review of any proposed regulations by the Joint Legislative Committee on Natural resources and Agriculture and the special legislative Commission on water supply. This amendment was adopted by the House.[7]

On third reading on December 10, 1985, minor additional amendments dealing with water emergencies and registrations for contaminated supplies were adopted, and the amended bill was engrossed for concurrence by the Senate with he House amendments.

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[5] Pursuant to G.L. c. 30A sec. 1, a regulation is defined as follows:

"Regulation" includes the whole or any part of every rule, regulation, standard or other requirement of general application and future effect, including the amendment or repeal thereof, adopted by an agency to implement or interpret the law enforced or administered by it, but does not include (a) advisory rulings issued under section eight; or (b) regulations concerning only the internal management or discipline of the adopting agency or any other agency, and not substantially affecting the rights of or the procedures available to the public or that portion of the public affected by the agency's activities; or (d) regulations relating to the use of the public works, including streets and highways, when the substance of such regulations is indicated to the public by means of signs or signals; or (e) decisions issued in adjudicatory proceedings."

Because G.L. c. 21G sec. 14 makes it a crime to violate any regulation issued by the Department under the Act, no regulation may be adopted in the absence of the public notice and hearing process required by G.L. c. 30A sec. 2. No such hearing took place prior to the adoption of the DEP Water Management Act policy at issue here.

[6] S1792, another version of the proposed Water Management Act (which also contained numerous requirements for the DEP to act by regulation), H2814, an act dealing with water emergencies, H3003, a very abbreviated proposal for protecting groundwater resources, and H4303 establishing watershed management in the Bureau of Forest development.

[7] A second amendment that would give to local planning boards by 2/3 vote the power to override DEP permitting decisions under the Act was defeated. 1985 HJ 1863—1864.

On December 12, 1985, the Senate agreed to the House amendments, and the following new section was added to S2447:

SECTION 3. The department shall submit to the clerk of the House of Representatives any regulations promulgated under the provisions of this Act and shall forward such regulations to the joint committee on natural resources and agriculture and the special commission on water supply for its review within sixty days prior to the effective date of said regulations.

Only after this new Section 3 was included in the bill was the Water Management Act adopted for signature by the Governor into law on December 16, 1985 (1985 SJ 1713-1714).

This Legislative History underscores the seriousness of the Legislative command to adopt Water Management Act standards by regulation pursuant to G.L. c. 30A. Prior versions of the legislation contained virtually identical requirements (see e.g. 1983 S 1826; 1985 S 1792), proposals that lacked such requirements were not adopted into law (see 1985 H2814, 1985 H 3003, 1985 H4304), and ultimately, the Legislature required that the Joint Committee on Natural Resources and Agriculture have prior review of any proposed regulations adopted under the Act.

It is an obvious and readily discernable Legislative intention that proposed standards for permits under the Water Management Act such as those contained in the policy be adopted only after the most public and inclusive process.[8]

Certainly, if the Legislature required <u>its</u> prior approval of regulations establishing Water management Act permit standards, it would not countenance the "behind closed door" development of internal DEP policy as a surrogate for the open process it authorized, and indeed, required in the law.

5. The Policy is Not Merely an Interpretation of Existing Regulation—It Establishes Standards and Criteria for the Issuance of Permits, Thereby Implicating G.L. c. 21G sec. 3 and 7

DEP has in fact promulgated regulations under the Water Management Act, found at 310 CMR 36.00 et. seq. I expect that DEP will argue that the policy merely interprets its existing regulations and therefore is a lawful exercise of its authority to interpret its own regulations.

The problem with this approach, at the risk of being somewhat facetious, is that it ignores plain English. G.L. c. 21G sec. 3 and 7 require standards and criteria for permits to be adopted by regulation in accordance with G.L. c. 30A. The policy expressly states that:

[8] The creation of this Blue Ribbon Commission in response to tehe policy reflects the Legislature's continuing concern that Water Management Act permit standards and criteria be adopted in an open and inclusive process.

> "*The following standards and conditions will be included as appropriate in all permitting decisions, including the issuance of new permits, permit amendments, 5 Year Reviews of existing permits, or other permit modifications…"*

Any argument that this policy merely "interprets" existing regulation and does not impose substantive standards on permit decisions is at best strained, and at worst, disingenuous. If the policy does not establish standards and criteria for the issuance of permits, why does it say that it does?

There is no interpreting going on in the policy. It is clearly a set of standards and criteria for Water Management Act permits masquerading as a "policy". The Legislature told DEP how it could exercise its authority to establish such standards and criteria, and the Department's choice of methods is beyond the scope of the authority conferred on it by the Legislature.

CONCLUSION

DEP Policy No. WMA #: BRP/DWM/DW/P04-1 is unlawful because (1) it establishes substantive standards and criteria which govern permit decisions under the Water Management Act and (2) the Legislature has required that such standards and criteria may be promulgated only after (a) consultation with the Water Resources Management Advisory Committee (b) by regulation in accordance with G.L. c. 30A, and (c) after review by the Joint Committee on Natural Resources and Agriculture.

None of these prerequisites to the lawful establishment of standards and criteria for Water Management Act permits occurred before DEP implemented the standards and criteria contained in the policy.

"[A]n administrative board or officer has no authority to promulgate rules and regulations which are in conflict with the statutes or exceed the authority conferred by the statutes by which such board or office was created. See, *Electronics Corp. of America c. Commissioner of Revenue*, 402 Mass. 672, 677, 524 N.E.2d 1338 (1988); *Morey v. Martha's Vineyard Commission*, 403 Mass. 813, 818, 569 N.E.2d 826 (1991).

DEP's action to promulgate Water Management Act permit standards by policy and technical guidance is squarely at odds with legislature's requirement that such standards be enacted by regulation in accordance with G.L. c. 30A. The policy is therefore an *ultra vires* act by DEP, unlawful, a legal nullity, and ought to be rescinded or vacated.[9]

[9] It is not the intention of this Memorandum to address the substantive concerns of the Massachusetts Water Works Association, Inc. and its members concerning the standards and criteria contained in the policy. For an abbreviated discussion of those substantive concerns, please refer to the MWWA "White Paper" on the policy dated April 25, 2006 available at http://www.masswaterworks.org/documents/White%20PaperFinal4-25-06.pdf